

IN THE CIRCUIT COURT, EIGHTH
JUDICIAL CIRCUIT, IN AND FOR
ALACHUA COUNTY, FLORIDA

CASE NO.: 012016-DR-001944

JOSE ANTONIO DIAZ-AVILA,
Petitioner/Husband,

vs.

JOHANA NATALY MENDOZA DIAZ,
Respondent/Wife.

ORDER

THIS CAUSE comes before the Court on verified petition for return of minor children to Petitioner and Petition for immediate issuance of show cause order to Respondent filed on May 31, 2016. Petitioner filed the Verified Petition pursuant to The Convention on the Civil Aspects of International Child Abduction ("the Hague Convention"), as implemented by the International Child Abduction Remedies Act ("ICARA"), 22 U.S.C. § 9001. In the Verified Petition, Petitioner Jose Antonio Diaz-Avila, a citizen and resident of Spain, requests the return of his minor children P.J.D. and R.N.D. ("the Minor Children"), from the United States to Spain. Respondent Johana Nataly Mendoza Diaz, the mother of the Minor Children, filed an answer to the Verified Petition on July 6, 2016. Respondent and the Minor Children are currently residing in Gainesville, Florida. This Court held an evidentiary hearing and both parties appeared with their counsel. The Court

heard testimony from the parties as well as several witnesses. Both parties submitted written closing arguments. Accordingly, this matter is ripe for review.

I. Prima Facie Case

The purpose of the Hague Convention is “to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access.” See Convention, pmbl. The Convention generally intends to “restore the pre-abduction status quo and deter parents from crossing borders in search of a more sympathetic court.” Wigley v. Hares, 82 So.3d 932, 935-36 (Fla. 4th DCA 2011) quoting Friedrich v. Friedrich, 78 F.3d 1060, 1064 (6th Cir. 1996). As such, the court’s inquiry is limited to the merits of the abduction claim and not the merits of the underlying custody battle. Id.; See also Sanchez v. Suasti, 140 So.3d 658, 662 (Fla. 3d DCA 2014). The Hague Convention “applies to children under sixteen years of age who are ‘habitually resident’ in a contracting state (Convention, Art. 4) and are ‘wrongfully removed’ to another contracting state (Convention, Art.1).” Seaman v. Peterson, 766 F.3d 1252, 1257 (11th Cir. 2014). A removal is “wrongful” within the meaning of the Hague Convention where:

- a. it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and
- b. at the time of the removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph above, may rise in particular by operation of law or by reason of a judicial or administrative decision or by reason of an agreement having legal effect under the law of that State.

See Convention, Art. 3. The petitioner bears the burden of establishing by a preponderance of the evidence that “the child has been wrongfully removed or retained within the meaning of the Convention.” See 22 U.S.C § 9003(e)(1)(A). If a petitioner establishes a wrongful removal or retention, then “the authority concerned shall order the return of the child forthwith,” unless the respondent establishes one of the affirmative defenses enumerated in the Convention. See Convention, Art. 12.

To prevail on his Petition, Mr. Diaz must prove that: (1) the Minor Children were “habitually resident” in Spain at the time Mrs. Hidalgo removed them to the United States; (2) the removal was in breach of Mr. Diaz’s custody rights under Spanish law, and (3) Mr. Diaz was exercising those rights at the time of removal. See Ruiz v. Tenorio, 392 F.3d 1247, 1251(11th Cir. 2004). The parties agree that the Minor Children are under the age of sixteen and were born in Venezuela. The

parties do not agree that Spain was the habitual residence of the Minor Children.

II. Discussion

Petitioner and Respondent were married September 11, 2003 in Venezuela, and moved to Spain in January 2013. During the course of the marriage, the Minor Children were born, to wit: P.J.D., born October 20, 2005, and R.N.D., born April 30, 2008. At the time of his application to the Central Authority of the United States of America, Petitioner was located in La Orotava, Tenerife on the Canary Islands (Spain). Respondent holds Venezuelan citizenship. Petitioner and the Minor Children hold dual citizenships in Spain and Venezuela.

In August, 2014, Petitioner accepted a teaching position at the University of Florida in Gainesville, FL (United States). Both parties and the Minor Children moved to Gainesville, FL. Petitioner entered the United States with a J-1 Visa; Respondent and the Minor Children entered the United States with J-2 Visas. In May, 2015, Petitioner, Respondent, and the Minor Children returned to Spain as they had done previously, such as Petitioner was required to appear personally to satisfy the Spanish government's pension requirements. Respondent threatened to leave with minor children; Petitioner opposed. On July 17, 2015, Respondent and the Minor Children, without consent, permission, or knowledge of Petitioner, traveled to the United States using the prior issued J-2 Visas. Respondent did not possess a required DS-19 form.

Petitioner currently resides in Spain. Respondent and the Minor Children currently reside at 4122 NW 20th Terrace, Gainesville, FL (United States). The Convention applies to cases where a child under the age of sixteen (16) years has been removed from his or her habitual residence in breach of the rights of custody of a petitioner, which the petitioner had been exercising at the time of the wrongful removal¹ or wrongful retention of the child. This Court finds the Minor Children were habitually residing in Spain within the meaning of Article 3 of the Convention immediately before they were wrongfully removed by Respondent.

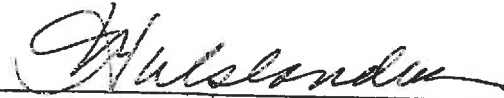
Accordingly it is,

ORDERED:

1. Petitioner's motion to return the Minor Children to Petitioner in Spain is **GRANTED** as follows.
2. The Minor Children's habitual residence is Spain.
3. Respondent ~~Juan Manuel~~ ~~Teruel~~ ~~Diaz~~ ~~San~~ ~~il~~ surrender custody of the Minor Children, P.J.D. and R.N.D., within 14 days of this order, for return to Spain. Counsel for Petitioner shall coordinate arrangements for the Minor Children's surrender with counsel for Respondent.
4. Counsel for the Respondent is directed to immediately release the Minor Children's passports to Petitioner or his counsel so that the Minor Children

may travel to Spain.

DONE this 2nd day of March, 2017, in Alachua County, Florida.



Hon. Judge Victor L. Hulslander
Circuit Court Judge

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